

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 9, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1180**

**Cir. Ct. No. 2011SC9496**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**KATHARINE KEYES AND JEREMY GRUNER,**

**PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,**

**V.**

**WILLIAM WALDBILLIG,**

**DEFENDANT-APPELLANT-CROSS-RESPONDENT,**

**JUSTIN AND ASSOCIATES,**

**DEFENDANT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed in part, reversed in part, and cause remanded with directions.*

¶1 KLOPPENBURG, J.<sup>1</sup> Landlord William Waldbillig appeals a judgment against him in favor of tenants Katharine Keyes and Jeremy Gruner in the amount of \$2,070.75, for a wrongful withholding from a security deposit in violation of WIS. ADMIN. CODE ATP § 134.06, plus additional damages for attorney's fees and costs. Keyes and Gruner cross-appeal, arguing that the circuit court failed to award double damages and requesting appellate attorney's fees pursuant to WIS. STAT. § 100.20(5). I conclude that Waldbillig wrongfully withheld \$600.00 from the tenants' security deposit, because costs incurred while attempting to re-rent an apartment are not an allowable claim for a landlord to deduct from a security deposit. Therefore, I affirm the circuit court's judgment in that respect. However, I reverse on the tenants' cross-appeal, because tenants are entitled to double damages and attorney's fees when a court determines that a landlord violated WIS. ADMIN. CODE ATP § 134.06. Accordingly, I remand to the circuit court to award double damages and determine an appropriate award of reasonable appellate attorney's fees.

## BACKGROUND

¶2 Katharine Keyes and Jeremy Gruner entered into a residential lease with William Waldbillig naming Waldbillig as the landlord and Waldbillig's property management business, Justin & Associates, as the agent for maintenance, management, and collection of rents. The lease's term was from August 1, 2011 to July 31, 2012. Keyes paid the required security deposit of \$625.00 and the first

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

month's rent (for the month of August) to Justin & Associates prior to moving into the apartment.

¶3 On August 7, 2011, Keyes and Gruner notified Waldbillig in writing that she and Gruner were "breaking" the lease and would be vacating the apartment that same day. Additionally, they stated "we will leave you with the entire first month's rent of \$635" but requested return of the \$625.00 security deposit. Waldbillig responded in writing on August 8, 2011, and explained that "there will be charges against your security deposit to cover the cost of advertising and marketing for [the] apartment" and that Justin & Associates charges to sublet and show apartments at a rate of \$100.00 per showing.

¶4 On August 17, 2011, Justin & Associates provided Keyes with a written accounting that itemized the withholdings from the security deposit. Justin & Associates withheld \$600.00 from the \$625.00 security deposit. A letter accompanying the accounting statement explained that the costs were required to "re-market an apartment in this situation." The letter stated: "The property also needed to [be] shown and walked through on six occasions in order to be rented. Justin & Associates charges \$100 per showing. This will be deducted from your security deposit in order to cover our expenses." The accounting itemization labeled \$600.00 withheld for "[c]harges to re-rent apartment as explained above."

¶5 Keyes and Gruner filed a small claims complaint, alleging that Waldbillig violated both WIS. ADMIN. CODE ATCP § 134.06(3) and Madison General Ordinance § 32.07(14) and seeking damages. The small claims court commissioner held a hearing and dismissed the case. Keyes and Gruner filed a demand for trial de novo in circuit court.

¶6 At the de novo trial in circuit court, Waldbillig argued that the security deposit was withheld to cover a rent deficiency for the month of September. Waldbillig provided the court with a copy of a lease that he entered into with new tenants for the same apartment on September 26, 2011. The term of the lease was from October 1, 2011 to July 31, 2012. In addition to the security deposit accounting and its accompanying letter, Keyes provided the court with a copy of the apartment's September utility bill, which indicated that the account was placed under the new tenants for the month of September.

¶7 The circuit court issued a written decision and order, concluding that Waldbillig wrongfully withheld \$600.00 from the security deposit. Moreover, the court explained that the money was not withheld to cover a rent deficiency because Waldbillig "permitted the new tenant occupancy of the unit by allowing storage of the next tenant's personal property prior to the tenant actually moving into the unit." The court ordered Waldbillig to pay Keyes and Gruner \$600.00 and awarded reasonable attorney's fees and costs. The court entered judgment against Waldbillig in the amount of \$2,070.75. Waldbillig now appeals.

## **DISCUSSION**

### **A. Landlord's Appeal.**

¶8 On appeal, Waldbillig argues that under the terms of the lease the tenants were liable for any rent deficiency if the tenant abandoned the premises before expiration of the lease term. He asserts that he legally withheld \$600.00 from the security deposit under WIS. ADMIN. CODE ATCP § 134.06(3) as unpaid rent for which the tenants were legally responsible. The interpretation and application of a statute or code provision are questions of law subject to a de novo

standard of review. *Boelter v. Tschantz*, 2010 WI App 18, ¶6, 323 Wis. 2d 208, 779 N.W.2d 467 (WI App 2009).

¶9 Within twenty-one days after a tenant moves out, a landlord is required to either return the tenant's security deposit or provide an itemized list accounting for any money withheld from the security deposit. WIS. ADMIN. CODE ATCP § 134.06(2), (4). The Wisconsin Administrative Code restricts a landlord's withholdings from a security deposit as follows:

(a) A landlord may withhold from a tenant's security deposit only for the following:

1. Tenant damage, waste or neglect of the premises.
2. Unpaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats.
3. Payment which the tenant owes under the rental agreement for utility service provided by the landlord but not included in the rent.
4. Payment which the tenant owes for direct utility service provided by a government-owned utility, to the extent that the landlord becomes liable for the tenant's nonpayment.
5. Unpaid mobile home parking fees which a local unit of government has assessed against the tenant under s. 66.0435 (3), Stats., to the extent that the landlord becomes liable for the tenant's nonpayment.
6. Other reasons authorized in the rental agreement according to par. (b).

(b) ... The landlord shall include the nonstandard provisions, if any, in a separate written document entitled "**NONSTANDARD RENTAL PROVISIONS**" which the landlord provides to the tenant. The landlord shall specifically identify and discuss each nonstandard provision with the tenant before the tenant enters into any rental agreement with the landlord. If the tenant signs or initials a nonstandard rental provision, it is rebuttably presumed that the landlord has specifically identified and

discussed that nonstandard provision with the tenant, and that the tenant has agreed to it.

WIS. ADMIN. CODE ATCP § 134.06(3)(a)-(b). The statute seeks to discourage landlords from withholding security deposits except in the clearest of cases. *Pierce v. Norwick*, 202 Wis. 2d 587, 594, 550 N.W.2d 451 (Ct. App. 1996). “If a landlord withholds amounts that do not represent an allowable claim under this section, he is in violation of the code.” *Armour v. Klecker*, 169 Wis. 2d 692, 699, 486 N.W.2d 563 (Ct. App. 1992).

¶10 Turning to the present case, the facts demonstrate that Waldbillig withheld \$600.00 for the costs associated with re-renting the apartment, which is not an allowable claim for withholding amounts from a security deposit under the controlling code provision. Waldbillig explicitly informed Keyes in writing on both August 8 and 17, 2011, that the costs of showing the apartment would be deducted from the security deposit. Furthermore, Waldbillig explicitly indicated in the accounting that \$600.00 was withheld to cover the cost of re-renting the apartment, specifically six showings to prospective tenants at a rate of \$100.00 per showing. The itemization reflects that Waldbillig withheld \$600.00 from the security deposit for “[c]harges to re-rent apartment.” In sum, the evidence clearly shows that Waldbillig withheld amounts from Keyes’ security deposit for costs associated with showing the apartment. Because that is not an allowable claim under WIS. ADMIN. CODE ATCP § 134.06(3), Waldbillig wrongfully withheld amounts from the security deposit and violated the code.<sup>2</sup>

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<sup>2</sup> The parties’ lease did not contain any nonstandard rental provisions complying with WIS. ADMIN. CODE ATCP § 134.06(3)(b) that would authorize Waldbillig’s withholding.

¶11 Waldbillig argues that there was a rent deficiency for the month of September and thus he lawfully withheld the security deposit as unpaid rent for which the tenants were legally responsible. *See* WIS. ADMIN. CODE ATP § 134.06(3)(a)2. As outlined above, the evidence demonstrates the contrary. In Waldbillig’s own written words, \$600.00 was withheld for the costs of re-renting the apartment, which constitutes a wrongful withholding under WIS. ADMIN. CODE ATP § 134.06(3). This court has previously explained that “[i]t is no defense to this code provision that the landlord believed he had a claim against [the tenants] for lost rents.” *Armour*, 169 Wis. 2d at 699.

¶12 It is true that Waldbillig may have had an actionable claim against the tenants under WIS. STAT. § 704.29, which allows a landlord to recover rent and damages (minus amounts obtainable in the course of the landlord’s mitigation) from a tenant that unjustifiably “breaks” a lease and, if successful, such damages could have been used to offset the tenant’s award for the wrongful withholding. *See Paulik v. Coombs*, 120 Wis. 2d 431, 439, 355 N.W.2d 357 (Ct. App. 1984) (holding that a landlord’s violation of the regulations governing security deposits “does not estop a landlord from counterclaiming for damages suffered as a result of statutory violations and/or damages to the premises by the tenants”); *see also Pierce*, 202 Wis. 2d at 596 and *Moonlight v. Boyce*, 125 Wis. 2d 298, 305-07, 372 N.W.2d 479 (Ct. App. 1985) (damages resulting from a violation of WIS. ADMIN. CODE ATP § 134.06 may be offset by the landlord’s actual damages). However, nothing in the record indicates that Waldbillig filed a counterclaim in this action. Therefore, the only cause of action in this case was that concerning Waldbillig’s wrongful withholding from the security deposit, and I affirm the circuit court’s judgment as to that issue.

## B. Tenants' Cross-Appeal.

¶13 On cross-appeal, Keyes and Gruner argue that, in addition to reasonable attorney's fees, the circuit court should have awarded double damages pursuant to WIS. STAT. § 100.20(5), which provides:

Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

¶14 WISCONSIN ADMIN. CODE ATCP § 134.06 was adopted pursuant to WIS. STAT. § 100.20. *Armour*, 169 Wis. 2d at 698. If a court determines that a landlord violated WIS. ADMIN. CODE ATCP § 134.06, it is required to award double damages and attorney's fees under the mandatory language of WIS. STAT. § 100.20(5). *Id.* The *Armour* court recognized that: "requiring a landlord to pay double damages and attorney fees when he believes he has a claim to the security deposit is harsh. This result, however, is consistent with the purpose of the regulations, which is to discourage the retention of security deposits except in the clearest of cases." *Id.* at 701. Here, although the circuit court correctly ordered the payment of reasonable attorney's fees, it failed to award double damages as well. Therefore, I reverse the circuit court's judgment on cross-appeal and remand the case to the circuit court for it to award double damages pursuant to WIS. STAT. § 100.20(5).

¶15 Finally, Keyes and Gruner request reasonable appellate attorney's fees, also pursuant to WIS. STAT. § 100.20(5). The Wisconsin Supreme Court has held that "a tenant who has suffered pecuniary loss because of a violation of Wis. Adm. Code Ch. [ATCP] 134 shall recover reasonable attorney fees for appellate review undertaken to attack or defend a trial court's decision in the suit." *Shands*



*v. Castrovinci*, 115 Wis. 2d 352, 359, 340 N.W.2d 506 (1983). It follows that the tenants are entitled to recover reasonable attorney's fees for defending this appeal and pursuing the cross-appeal, and I remand to the circuit court to determine the appropriate award.

### CONCLUSION

¶16 For the reasons set forth, I affirm in part the circuit court's judgment in favor of the tenants, because the landlord wrongfully withheld \$600.00 from the tenants' security deposit. I reverse in part on the tenants' cross-appeal and remand to the circuit court to award double damages and determine, within its discretion, an award of reasonable appellate attorney's fees.

*By the Court.*—Judgment affirmed in part, reversed in part, and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

